

**CITY OF FREDERICK
ZONING BOARD OF APPEALS
MEETING MINUTES
October 26, 2010**

MEMBERS PRESENT:	STAFF PRESENT:
Mr. Racheff Ms. Colby Mr. Hazlett Mr. Dario Cavazos Mr. Philip Dacey	Gabrielle Dunn, Division Manager of Current Planning Rachel Depo, Assistant City Attorney Jeff Love, City Planner Lea Ortiz, Office Manager

ANNOUNCEMENTS

For the benefit of the audience and especially the applicants, Mr. Racheff, Chairman, introduced everyone by name and department and explained the Zoning Board of Appeals process.

APPROVAL OF MINUTES:

September 28, 2010 Board of Zoning Appeals minutes

MOTION: Mr. Cavazos moved to approve the September 28, 2010 hearing minutes as published.

SECOND: Mr. Hazlett

VOTE: 4-0

GENERAL PUBLIC COMMENT

There was no general public comment.

CASES TO BE HEARD

CASE NO.: ZBA10-369CU

LOCATION: 5 East Church Street

APPLICANT: Richard Belles

DESCRIPTION:

The Applicant is requesting approval of a conditional use for the establishment of a restaurant with entertainment per Section 308 and Section 856 of the Land Management Code.

BACKGROUND INFORMATION:

The Applicant is requesting approval of a conditional use for the establishment of entertainment at the existing restaurant at 5 E. Church Street. The live entertainment will consist of acoustic acts, bands, karaoke, DJ's, and game nights (i.e. trivia).

STAFF RECOMMENDATION

Based upon the findings of fact, Staff recommends approval of the conditional use request for a restaurant with entertainment finding that:

1. The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the existing restaurant is in harmony with these goals.
2. The DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic. Compliance with the criteria established under Section 856 of the LMC will ensure that the proposed use will not create a greater adverse impact than any use permitted by right in the DB district.
3. The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* based on the following:
 - a. The restaurant sells unpackaged food to the consumers in a ready-to-consume state, in individual servings or in non-disposable containers, where the customer consumes these foods while seated at tables located within the building.
 - b. There is regular seating (not including seats at a counter or bar) for 90% of the overall seating capacity.
 - c. The Applicant has provided a quarterly sales report which indicates that alcohol sales have not exceeded 40% of the overall revenue for the past two quarters and that the Applicant will be required to continue to provide documentation verifying compliance after the issuance for a zoning certificate for a restaurant with entertainment for a period of one year.
 - d. The Applicant has indicated that the entertainment to be provided will not include sexual conduct, nudity, or obscenity.
 - e. The Applicant has assured the Board their consent to the conditions of approval and that noncompliance may result in termination of the zoning certificate for a restaurant with entertainment.
 - f. That all activity at the restaurant will comply with Section 15-21 of the City Code.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must provide quarterly revenue statements for a period of one year from the date of the issuance of the zoning certificate.

APPLICANT PRESENTATION:

Mr. Belles, resident at 551 Heather Ridge Drive, Unit B, Frederick, MD 21701, concurred with the staff report. He is asking for an approval of a Zoning Certificate to provide entertainment for his patrons to generate more revenue.

DISCUSSION:

Mr. Racheff asked the applicant what type of music he is planning to have at this establishment. Mr. Belles responded by saying he is looking primarily to acoustic instruments, jazz and piano instruments.

Mr. Cavazos asked if the second quarter sales for food and alcohol are accurate as the percentage of alcohol sales was significantly over 40% of the food sales. Mr. Love explained that the 40% requirement is from the total sales and not a percentage of the food sales versus alcohol sales. Ms. Colby asked if this establishment would have any dancing. The Applicant indicated that that wasn't likely as there is very little room to do such.

PUBLIC COMMENTS:

There was no public comment.

MOTION: Ms. Colby moved to approve ZBA10-369CU as a conditional use for the establishment of a restaurant with entertainment for Section 308 and Section 856 of the Land Management Code for the Cellar Door located at 5 East Church Street finding that:

1. The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the existing restaurant is in harmony with these goals.
2. The DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic. Compliance with the criteria established under Section 856 of the LMC will ensure that the proposed use will not create a greater adverse impact than any use permitted by right in the DB district.
3. The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* based on the following:
 - a. The restaurant sells unpackaged food to the consumers in a ready-to-consume state, in individual servings or in non-disposable containers, where the customer consumes these foods while seated at tables located within the building.
 - b. There is regular seating (not including seats at a counter or bar) for 90% of the overall seating capacity.
 - c. The Applicant has provided a quarterly sales report which indicates that alcohol sales have not exceeded 40% of the overall revenue for the past two quarters and that the Applicant will be required to continue to provide documentation verifying compliance after the issuance for a zoning certificate for a restaurant with entertainment for a period of one year.
 - d. The Applicant has indicated that the entertainment to be provided will not include sexual conduct, nudity, or obscenity.
 - e. The Applicant has assured the Board their consent to the conditions of approval and that noncompliance may result in termination of the zoning certificate for a restaurant with entertainment.
 - f. That all activity at the restaurant will comply with Section 15-21 of the City Code.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must provide quarterly revenue statements for a period of one year from the date of the issuance of the zoning certificate.

SECONDED: Mr. Cavazos

VOTE: 4-0

CASE NO.: ZBA10-351CU

LOCATION: 1726 Shookstown Road

APPLICANT: Scotia Mortensen

DESCRIPTION:

The Applicant is requesting approval of a conditional use for the establishment of a child care center with up to twelve (12) children per §308 and §811 of the Land Management Code.

BACKGROUND INFORMATION:

The Applicant is requesting approval of a conditional use for the establishment of a child care center with up to twelve (12) children at 1726 Shookstown Road. Section 811 of the LMC outlines the requirements for the approval of different types of child care uses. Child daycare centers with an unlimited number of children are permitted by right in the RO, NC, GC, DB, MU, and MXE district subject to review and approval of a site plan when necessary and are also permitted in the IST and PB districts as an accessory use. Additionally, family care centers with up to eight (8) children are permitted in any residential district without any approvals from the City under §811(c). In the case of this request, the Applicant has applied for a small child care center with up to twelve (12) children, which are permitted in any residential district by conditional use per §811(d).

STAFF RECOMMENDATIONS:

Based upon the findings of fact, Staff recommends approval of the conditional use request for a restaurant with entertainment finding that:

1. The proposed use is in harmony with the policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC); and that
2. The inclusion of the child care center will not create impacts to the community that are greater than those which are normally associated with a residential dwelling unit; and that
3. The proposed use of a child care center complies with the provisions of Article 8, Section 811 entitled *Child Day Care Center* based on the following:
 - a. The proposed child care center will not create a nuisance due to increased noise, traffic, or other activity associated with the use; and that
 - b. Only one (1) nonresident will be employed and off-street parking is available for the one (1) employee.
 - c. Sufficient pick-up and drop-off areas are available in the existing driveway.
 - d. There is approximately 15,181 s.f. of lot area per child.
 - e. The Applicant has provided a statement that they will present the City with a childcare licensing certificate and inspection report from the Child Care Administration of the State of Maryland.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must furnish a copy of the state licensing certificate and inspection report to the City within six (6) months of the issuance of the zoning certificate or the approval shall become void.

APPLICANT PRESENTATION:

Ms. Mortensen of 2038 Flintshire Road, Baltimore, MD 21237, stated she concurred with the staff report.

DISCUSSION:

Mr. Dacey asked the Applicant if she would be leasing this residence. Ms. Mortensen said yes she would be leasing this property.

Ms. Colby explained that at the field trip they saw the parking areas and Mr. O'Rear, the property owner, indicated that he was the owner of the adjacent properties as well.

It was noted that in the staff report it mentioned 15,000 s.f. per child which should read 1,500 s.f. per child.

PUBLIC COMMENT:

There was no public comment.

MOTION: Mr. Dacey moved to approve ZBA10-351CU for a conditional use for a child day care center for 12 children based on the findings of fact that:

1. The proposed use is in harmony with the policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC); and that
2. The inclusion of the Small Child Care Center will not create impacts to the community that are greater than those which are normally associated with a residential dwelling unit; and that
3. The proposed use of a Small Child Care Center complies with the provisions of Article 8, Section 811 entitled *Child Day Care Center* based on the following:
 - a. The proposed Small Child Care Center will not create a nuisance due to increased noise, traffic, or other activity associated with the use; and that
 - b. Only one (1) nonresident will be employed and off-street parking is available for the one (1) employee.
 - c. Sufficient pick-up and drop-off areas are available in the existing driveway.
 - d. There is more than 1,000 s.f. of lot area per child.
 - e. The Applicant has provided a statement that they will present the City with a childcare licensing certificate and inspection report from the Child Care Administration of the State of Maryland.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must furnish a copy of the state licensing certificate and inspection report to the City within six (6) months of the issuance of the zoning certificate or the approval shall become void.

SECOND: Mr. Hazlett

VOTE: 4-0

CASE NO.: ZBA10-368NCU

LOCATION: 614-626 North Market Street

APPLICANT: Ron Cramer, Habitat for Humanity

DESCRIPTION:

The Applicant is requesting conditional use approval to substitute the existing nonconforming use of an "Automobile Sales and Service Center (dealership)" with the new nonconforming use of a

“Building Supplies, Lumber” retailer in accordance with §905(c) of the Land Management Code (LMC)

BACKGROUND INFORMATION:

The site has most recently been used as the Renn-Kirby automobile dealership which is classified as an “*Automobile Sales and Service Center*.” Per §404, Table 404-1 of the LMC, automobile sales and service centers are not permitted in the DB district. The Applicant is seeking to relocate the Habitat for Humanity ReStore that is currently located at 1109 E Patrick Street to the subject property. In evaluating the request, the Zoning Administrator determined the use to be most appropriately classified as a “*building supplies, lumber*” retailer based on the nature of the materials for sale and the operations of the establishment (See Exhibit 2). This use is also prohibited in the DB district.

Staff noted that the Applicant has asserted that the operation is more consistent with the use of “*Hardware, Inside Storage*,” which is a permitted use in the DB district. Upon initial approach by the Applicant, Staff advised how this use would be classified and the implications of this classification. The Applicant was advised of the two alternatives- 1) substitution of a nonconforming use or 2) request a formal zoning determination which can then be appealed to the ZBA. After much discussion, the Applicant chose to file the request for the substitution.

Ms. Dunn noted that before considering the approval criteria for the substitution of a nonconforming use, it is necessary to establish two prerequisites: 1) that the existing nonconforming use is a legal nonconformity and 2) that the existing nonconforming use has operated on the site within the last 12 months. Ms. Dunn stated that the existing use was rendered nonconforming with the adoption of the 1996 Zoning Map when the property’s zoning changed from B-3, which permitted automobile sales and service, to DB, which did not permit that use, thus making it a lawfully existing nonconformity. Ms. Dunn also noted that the Applicant indicated that Renn Kirby ceased their operation on the site on August 1, 2010, however, had not provided any additional documentation to this effect. Based on the August 1, 2010 date, a nonconforming use has been operated on this site within the past year and accordingly, the Applicant is eligible to request the substitution.

Ms. Dunn summarized the criteria under Section 308 and 905 of the LMC for the substitution of a nonconforming use which include the following:

- 1) The proposed use is in harmony with the purpose and intent of the Comprehensive Plan and this Code.
- 2) The characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact than the operation of any permitted use not requiring conditional use approval.
- 3) That the proposed activity will comply with all conditions and requirements established in Article 9, Section 905 which are as follows:
 - The Applicant assumes the burden of proof and shall sufficiently present facts and the Board shall determine that it is physically or economically impossible to change the use of the lot or parcel to a conforming use. Absence of this requirement shall automatically require the ZBA to deny the conditional use.
 - The Board shall also find that the new use is of an equally or more restricted use as indicated in the district regulations in Article 4.
 - The proposed substitution nonconforming use shall meet the off-street parking, off-street loading, and other applicable requirements of this Code that would normally be required for the establishment of a use in a district that allows the proposed use.

- The Applicant shall show that the proposed changes of nonconforming uses shall be less objectionable in external effects than the existing nonconforming use with respect to: traffic generation and congestion, including truck, passenger care and pedestrian traffic; noise, smoke, dust, gases, heat, odor, glare or vibration; storage and waste disposal; and appearance
- The Applicant must provide guarantees as deemed necessary by the Board to ensure that no hazardous or obnoxious effluent will be released in the air, water or onto the ground and that all wastes and byproducts will be disposed of in a safe and healthful manner.

STAFF RECOMMENDATIONS:

Ms. Dunn noted that Staff cannot support the requested substitution of a nonconforming use in order to replace an “automobile sales and service center” with a “building supplies, lumber” retailer at 614-626 N Market Street based on insufficient documentation with regards to criteria §905(c)(4)(A)(1) which requires the applicant to assume the burden of proof in documenting that it is physically or economically impossible to change the use of the lot or parcel to a conforming use.

APPLICANT PRESENTATION:

Mr. Ron Cramer, Executive Director for Habitat for Humanity, resides at 2 Church Street introduced Mr. Brian Duncan and Mr. Steve Fox. Mr. Cramer presented a PowerPoint presentation showing who are they, indicating there are 500 plus stores across the United States, 12 ReStores in MD. He said the purpose of the ReStore is to sell new and gently used donated home improvement and household items at a deep discount for those improving Frederick housing stock. Occasionally, they receive donated items from manufacturers and/or retailers through HFHI. He mentioned that people come in looking for affordable alternatives to major retailers and that they take profits and rehab or build new affordable homes. Mr. Cramer presented the benefits of ReStore as they reuse and recycle so items do not end up in landfill or burn piles. Donors receive charitable tax credit and that they have the best volunteers. A slide showed what they accept and don't accept with hardware, lighting and electrical, plumbing, windows, doors & mantels, cabinets, furniture, shutters and tools are all acceptance to the ReStore. They do not accept clothing, electronics, hazardous materials, oil-based paints, siding, and brick or any masonry. Another slide showed the top selling categories that listed cabinets, hardware, appliances, bath fixtures, doors, lighting/electrical, windows, and furniture. Nearly 55% of their customers live in the City.

Mr. Duncan presented a slide that responded to the background information in the staff report, indicating that they sell household and home improvement items and that whether this should be classified as “hardware, inside storage” or “building supplies, lumber” could be open for discussion. Mr. Duncan stated that while in 1996 the City may have rendered some uses as nonconforming, the 2007 City Retail Market Analysis noted that its residents used such retail shops and that those stores were lacking in downtown. He went on to say that the same City funded reports states “home maintenance materials also represent a category where opportunity exists for Downtown expansion”. He felt that a retail store does meet this goal and that staff is focusing on tourism and arts but should also recognize the role of retail in meeting the goal of allowing land uses that enhance the Central Business District.

Mr. Duncan felt that this project would not create any greater adverse impact because their donated items come in pick-up trucks or their own trucks. Deliveries would be approximately 3 to 4 times a year, no outdoor storage would be on the premises. In regards to the proposed uses impacts in comparison with other uses permitted in the DB district, Mr. Duncan felt that Group Home,

Hotel/Motel, Convenience Stores, without gas sales, Department Stores, Discount Store, Furniture and/or Appliances, Grocery Stores, Office Furniture and Shopping center, all of which are allowed in the DB district but would in his opinion, create a more adverse impact than the ReStore and would require more large truck traffic. Mr. Duncan pointed out that the Webster's American English Dictionary defines "or" as "used to indicate an alternative" under the physically or economically impossible category. Mr. Duncan explained that they had Brian Nordyke, PE of Nordyke Design Group, Inc. draw up a plan for them indicating the unpredictable consequences of removing the single story framing which wraps two sides of the two-story structure. Given the age of both structures, it is likely that the two-story structure wall framing is dependent on the lateral bracing provided by the one story roof diaphragm. He also presented a slide for off street parking and loading prepared by Harris, Smariga & Associates showing the parking provided totals 70 spaces. The minimum required spaces are 41 and the maximum is 137 so they are well within the realm.

Mr. Fox provided the Board with letters of support from Jasmine Sneed, Elin Ross, Rick Adams, E. Kevin Lollar, Denise Jacoby, Jennifer Short who are all in support of this application. In conclusion from the Applicant they stated in the aforementioned Frederick City funded Retail Market Analysis, "The recruitment of additional independent retailers is recommended in Downtown Frederick to further enhance this retail mode's critical mass of unique specialty shops." He felt they will help the City meet this goal if allowed simply to operate at the now vacant Renn Kirby auto dealership facility.

DISCUSSION:

Mr. Racheff felt that the Applicant's contention is that they would be best classified as a "hardware store with inside sales" and that Staff believes the Applicant is better classified as a "building supply, lumber" retailer

Mr. Hazlett asked Staff what was different in their minds between the two classifications. Ms. Dunn explained that when Staff went on a site visit to the property, the justification was based on the site and scale of materials based on the assumption that hardware is typically a smaller scale product and more retail oriented as opposed to larger products such as some of things itemized on the website and presented in the Applicant's testimony, which is characteristic of a Home Depot or Lowes type of facility, not on the same scale obviously. There is not a definition in the Land Management Code of what is a hardware store, and there is no definition of building supply/lumber, it was an assumption or interpretation made after the site visit with evaluating the materials they provided.

Mr. Hazlett mentioned there was a use on Patrick Street that moved to Rosemont which carried a lot of stuff as this Applicant. Mrs. Dunn wanted the Board to keep in mind when looking through the Use Matrix that there are a whole variety of different uses and if Staff or the Administrator finds that there is a use that appropriately describes this use, they are obligated to select the most appropriate.

Mr. Dacey asked if a determination could be made with this application. Mrs. Depo stated that there would need to a formal determination that would be separate matter. Mrs. Dunn noted that the decision that is in front of the Board tonight is not whether the Zoning Administrator would call this a hardware store or not, the decision is whether this application meets the criteria for a substitution of a non-conforming use.

Mr. Cavazos asked the Applicant how long this property has been vacant. The owner, Mr. Sean Kirby, indicated that they had vacated in August of 2010 however it took them over a week to vacate the property.

Mr. Hazlett asked about the oil storage that is underground and how they were going to have it removed. Mr. Kirby, indicated that they had Phase II done and were not aware of any oil stored underground. Mr. Hazlett said in the repair center there is a funnel coming out of the floor where they were told waste was stored. Mr. Kirby told the Board that there is an oil separator for the water flow, but they had to do a Phase I and Phase II and he felt everything was done that they needed to have done.

Mr. Dacey wanted to know how long their lease was at this property. Applicant indicated they have a 5-year lease with Renn Kirby.

Regarding the outside storage, Ms. Colby asked the Applicant if they did have outdoor storage would Code Enforcement be involved. Mrs. Dunn said if the Board is to approve the application the Board could put a specific stipulation on the approval.

There was much discussion regarding the classification on this property and the definition of the word “impossible,” Mr. Hazlett thought that if the Board wanted to get into a debate about what is a hardware store or a lumber store. Board felt that they could not debate this because that is not the application. Applicant indicated that they would prefer hardware classification in this zone.

PUBLIC COMMENT:

Rev. Ken Dunnington resides at 620 Humberson Lane, Frederick, MD 21703 is in support of Habitat for Humanity in Frederick to be granted a nonconforming designation for the Renn Kirby property. He said that the Habitat for Humanity mission is to provide decent affordable housing in Frederick City and County. The goal that has become more and more difficult to achieve in these economic times in general, and in Frederick County, in particular, is that Habitat for Humanity Charter is to serve those in need and is rooted in the Christian Gospel. He mentioned that we cannot have affordable housing if Habitat for Humanity is not supplying hardware.

Ms. Bev Shelton resides at 9795 Chestnut Oak Court, Frederick, MD 21701, stated that she had started out as a board member for the non-profit building supply. She mentioned that they merged with Habitat for Humanity, which was the best thing they ever done. The building was cleaner, there was no lumber there and not sure where the word “lumber” came from in the first place. She asked the Board to really consider approval as this could help this part of town.

Mr. Steve Fox resides at 1566 Dockside Drive, Frederick, MD, mentioned that out all of their other locations, this is the only place that has been an issue with the store being located anywhere. He would hope that the Board approves this application.

Mr. Jean-Louis Lepage resides at 407 North Market Street.[\[g1\]](#)

Mr. Steve Duckson resides at 635 North Market stated they are 100% in support of this facility.

Ms. Valerie Waddle resides at 639 Swallowtail Drive, and is the financial manager for Habitat to Humanity and is in support for this application.

Ms. Marcia Hubbell resides at 6352 Knollwood Court stated she was a Manager for Habitat for Humanity and could possibly give the Board information that might help with the decision making easier. She didn't hear anything about having a furniture store that may be a use for this application. She explained

that most of the business was furniture and everything that is being sold is to people to improve their homes. She said most of the items that are purchased would be kitchen cabinets, paint, tile, etc. Many improvements are donated to Habitat. She cannot imagine anyone wanting to lease that building and it would be perfect for Habitat for Humanity. Mr. Racheff asked Ms. Hubbell what the main products were being sold. Ms. Hubbell responded by saying it would kitchen cabinets and following that would bathroom cabinets, furniture, doors, hardware, half sheets of plywood and that is the only lumber we receive.

Mr. Dacey asked Ms. Hubbell if it would be economically impossible to put something else in that building. Ms. Hubbell indicated that it would be impossible.

Mr. Dave Severn, Severn & O'Connor is in support of Habitat for Humanity. Mr. Severn noted that Ms. Dunn is dealing with a LMC that is not user friendly and he experienced various situations mainly in the interpretation of language in the Code. Mr. Severn asked if this was approved as a conditional use; which is the way this is set up, would that transfer with the property. Board shook their heads no. Mr. Severn went on to say so if the property is not transferrable the Applicant could not put in a Home Depot or something similar. He also said the LMC does not have a definition of supplies of lumber or a definition of hardware inside storage. He felt that the Board should look at the retail/sales which is a category permitted in a DB zone. Mrs. Dunn explained that Staff saw this building as supply/lumber category which seemed more appropriate for this application. Mr. Severn gave some legal points of the word "impossible" and an applicant has to come in here and prove to the Board that it is physically or economically impossible to change this property to a conforming use. He said he has been practicing law for 31 years and has never seen "impossible" used in any Zoning Ordinance. He felt that the Board is entitled to look at the word "impossible" and apply it in a reasonable interpretation of that word. He also felt that this property should be looked at as retail/sales. If the Board's decision to approve this application they could also put conditions on this application.

Mr. Randy Jones, Owner of Café 611, is in support of Habitat for Humanity and hopes not to see the building be empty for a long period of time. Mr. Jones commended Mrs. Dunn for her expertise and helpfulness in everything she does. He is encouraging the Board to look at approving this application.

Mr. Racheff asked Mr. Kirby if it was economically possible to use it for another use and if not; this is why the property owner is taking a lesser rent due to the economy. Mr. Kirby said yes.

Ms. Depo brought up the word "impossible" in the dictionary was referred to as "utterly" impossible.

APPLICANT REBUTTAL

Applicant indicated that Habitat ReStore is their financial well being. He felt that more homes could be built like the one they are doing on Madison Street to extend reusable products to people that have a need instead of putting it back in the landfill.

MOTION: Mr. Hazlett moved to approve ZBA10-368NCU substitution of non-conforming use for Habitat for Humanity at the Renn Kirby site in accordance with Section 308(a)(1) and 905(c) of the LMC allows the Zoning Board of Appeals to authorize a substitution of a nonconforming use with another nonconforming use as a conditional use. Section 308, "Conditional Uses" indicates that the ZBA may authorize conditional uses only when the Board finds that the following conditions are met:

- 1. The proposed use is in harmony with the purpose and intent of the Comprehensive Plan and the LMC.**

2. That the characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact that the operation of any permitted use not requiring conditional use approval.
3. That the Applicant has demonstrated that it is economy impossible to change the use of the lot or parcel to a conforming use.
4. That the new use is of an equally or more restricted use as indicated in the district regulations in Article 4 of the Land Management Code.
5. That based on testimony presented and a sight inspection, the proposed substitution of nonconforming use meets the off-street parking, off-street loading, and other applicable requirements of the LMC that would normally be required for the establishment of the use in a district that allows the proposed use.
6. That the change of nonconforming use will be less objectionable in external effects than the existing nonconforming use with respect to traffic generation and congestion; noise, smoke, dust gases, heat odor, glare, or vibration; storage and waste disposal; and appearance.
7. That the Applicant has provided assurances that no hazardous or obnoxious effluents will be released into the air, water or onto the ground and that all wastes and by products will be disposed of in a safe and healthful manner.
8. That the resulting activity will be equally or more compatible with permitted uses in the district.

With the following conditions:

1. That there will be no outside storage on the site.
2. That there will be no more than four (4) deliveries to the site by a tractor trailer per month.

Findings of Fact

- The subject property is zoned DB.
- The most recently existing use on the subject property is an “automobile sales and service” operation.
- An “automobile sales and service” operation is not permitted in the DB district.
- The previous use is considered a legal nonconforming use which has been in operation on the subject property within the past 12 months.
- The proposed use has been determined to be a “building supplies, lumber,” sales operation which is also not permitted in the DB zoning district.
- Section 905(c) grants the authority to the ZBA to authorize a conditional use approval for the substitution of one nonconforming use with another nonconforming use provided that all of the criteria outlined therein is met.

SECOND: Mr. Dacey

VOTE: 4-0

The meeting adjourned at 10:05 p.m.

Respectfully submitted,

Lea M. Ortiz

[g1] We should have some summary of what he said

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ANNOUNCEMENTS

For the benefit of the audience and especially the applicants, Mr. Racheff, Chairman, introduced everyone by name and department and explained the Zoning Board of Appeals process.

APPROVAL OF MINUTES:

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MOTION: Mr. Cavazos moved to approve the September 28, 2010 hearing minutes as published.

SECOND: Mr. Hazlett

VOTE: 4-0

GENERAL PUBLIC COMMENT

There was no general public comment.

CASES TO BE HEARD

**CASE NO.: ZBA10-369CU
LOCATION: 5 East Church Street
APPLICANT: Richard Belles**

DESCRIPTION:

The Applicant is requesting approval of a conditional use for the establishment of a restaurant with entertainment per Section 308 and Section 856 of the Land Management Code.

BACKGROUND INFORMATION:

The Applicant is requesting approval of a conditional use for the establishment of entertainment at the existing restaurant at 5 E. Church Street. The live entertainment will consist of acoustic acts, bands, karaoke, DJ's, and game nights (i.e. trivia).

STAFF RECOMMENDATION

Based upon the findings of fact, Staff recommends approval of the conditional use request for a restaurant with entertainment finding that:

1. The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the existing restaurant is in harmony with these goals.
2. The DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic. Compliance with the criteria established under Section 856 of the LMC will ensure that the proposed use will not create a greater adverse impact than any use permitted by right in the DB district.
3. The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* based on the following:
 - a. The restaurant sells unpackaged food to the consumers in a ready-to-consume state, in individual servings or in non-disposable containers, where the customer consumes these foods while seated at tables located within the building.
 - b. There is regular seating (not including seats at a counter or bar) for 90% of the overall seating capacity.
 - c. The Applicant has provided a quarterly sales report which indicates that alcohol sales have not exceeded 40% of the overall revenue for the past two quarters and that the Applicant will be required to continue to provide documentation verifying compliance after the issuance for a zoning certificate for a restaurant with entertainment for a period of one year.
 - d. The Applicant has indicated that the entertainment to be provided will not include sexual conduct, nudity, or obscenity.
 - e. The Applicant has assured the Board their consent to the conditions of approval and that noncompliance may result in termination of the zoning certificate for a restaurant with entertainment.
 - f. That all activity at the restaurant will comply with Section 15-21 of the City Code.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must provide quarterly revenue statements for a period of one year from the date of the issuance of the zoning certificate.

APPLICANT PRESENTATION:

Mr. Belles, resident at 551 Heather Ridge Drive, Unit B, Frederick, MD 21701, concurred with the staff report. He is asking for an approval of a Zoning Certificate to provide entertainment for his patrons to generate more revenue.

DISCUSSION:

Mr. Racheff asked the applicant what type of music he is planning to have at this establishment. Mr. Belles responded by saying he is looking primarily to acoustic instruments, jazz and piano instruments.

Mr. Cavazos asked if the second quarter sales for food and alcohol are accurate as the percentage of alcohol sales was significantly over 40% of the food sales. Mr. Love explained that the 40% requirement is from the total sales and not a percentage of the food sales versus alcohol sales. Ms. Colby asked if this establishment would have any dancing. The Applicant indicated that that wasn't likely as there is very little room to do such.

PUBLIC COMMENTS:

There was no public comment.

MOTION: Ms. Colby moved to approve ZBA10-369CU as a conditional use for the establishment of a restaurant with entertainment for Section 308 and Section 856 of the Land Management Code for the Cellar Door located at 5 East Church Street finding that:

1. The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the existing restaurant is in harmony with these goals.
2. The DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic. Compliance with the criteria established under Section 856 of the LMC will ensure that the proposed use will not create a greater adverse impact than any use permitted by right in the DB district.
3. The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* based on the following:
 - a. The restaurant sells unpackaged food to the consumers in a ready-to-consume state, in individual servings or in non-disposable containers, where the customer consumes these foods while seated at tables located within the building.
 - b. There is regular seating (not including seats at a counter or bar) for 90% of the overall seating capacity.
 - c. The Applicant has provided a quarterly sales report which indicates that alcohol sales have not exceeded 40% of the overall revenue for the past two quarters and that the Applicant will be required to continue to provide documentation verifying compliance after the issuance for a zoning certificate for a restaurant with entertainment for a period of one year.
 - d. The Applicant has indicated that the entertainment to be provided will not include sexual conduct, nudity, or obscenity.
 - e. The Applicant has assured the Board their consent to the conditions of approval and that noncompliance may result in termination of the zoning certificate for a restaurant with entertainment.
 - f. That all activity at the restaurant will comply with Section 15-21 of the City Code.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must provide quarterly revenue statements for a period of one year from the date of the issuance of the zoning certificate.

SECONDED: Mr. Cavazos
VOTE: 4-0

CASE NO.: ZBA10-351CU

LOCATION: 1726 Shookstown Road
APPLICANT: Scotia Mortensen

DESCRIPTION:

The Applicant is requesting approval of a conditional use for the establishment of a child care center with up to twelve (12) children per §308 and §811 of the Land Management Code.

BACKGROUND INFORMATION:

The Applicant is requesting approval of a conditional use for the establishment of a child care center with up to twelve (12) children at 1726 Shookstown Road. Section 811 of the LMC outlines the requirements for the approval of different types of child care uses. Child daycare centers with an unlimited number of children are permitted by right in the RO, NC, GC, DB, MU, and MXE district subject to review and approval of a site plan when necessary and are also permitted in the IST and PB districts as an accessory use. Additionally, family care centers with up to eight (8) children are permitted in any residential district without any approvals from the City under §811(c). In the case of this request, the Applicant has applied for a small child care center with up to twelve (12) children, which are permitted in any residential district by conditional use per §811(d).

STAFF RECOMMENDATIONS:

Based upon the findings of fact, Staff recommends approval of the conditional use request for a restaurant with entertainment finding that:

1. The proposed use is in harmony with the policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC); and that
2. The inclusion of the child care center will not create impacts to the community that are greater than those which are normally associated with a residential dwelling unit; and that
3. The proposed use of a child care center complies with the provisions of Article 8, Section 811 entitled *Child Day Care Center* based on the following:
 - a. The proposed child care center will not create a nuisance due to increased noise, traffic, or other activity associated with the use; and that
 - b. Only one (1) nonresident will be employed and off-street parking is available for the one (1) employee.
 - c. Sufficient pick-up and drop-off areas are available in the existing driveway.
 - d. There is approximately 15,181 s.f. of lot area per child.
 - e. The Applicant has provided a statement that they will present the City with a childcare licensing certificate and inspection report from the Child Care Administration of the State of Maryland.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must furnish a copy of the state licensing certificate and inspection report to the City within six (6) months of the issuance of the zoning certificate or the approval shall become void.

APPLICANT PRESENTATION:

Ms. Mortensen of 2038 Flintshire Road, Baltimore, MD 21237, stated she concurred with the staff report.

DISCUSSION:

Mr. Dacey asked the Applicant if she would be leasing this residence. Ms. Mortensen said yes she would be leasing this property.

Ms. Colby explained that at the field trip they saw the parking areas and Mr. O'Rear, the property owner, indicated that he was the owner of the adjacent properties as well.

It was noted that in the staff report it mentioned 15,000 s.f. per child which should read 1,500 s.f. per child.

PUBLIC COMMENT:

There was no public comment.

MOTION: Mr. Dacey moved to approve ZBA10-351CU for a conditional use for a child day care center for 12 children based on the findings of fact that:

1. The proposed use is in harmony with the policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC); and that
2. The inclusion of the Small Child Care Center will not create impacts to the community that are greater than those which are normally associated with a residential dwelling unit; and that
3. The proposed use of a Small Child Care Center complies with the provisions of Article 8, Section 811 entitled *Child Day Care Center* based on the following:
 - a. The proposed Small Child Care Center will not create a nuisance due to increased noise, traffic, or other activity associated with the use; and that
 - b. Only one (1) nonresident will be employed and off-street parking is available for the one (1) employee.
 - c. Sufficient pick-up and drop-off areas are available in the existing driveway.
 - d. There is more than 1,000 s.f. of lot area per child.
 - e. The Applicant has provided a statement that they will present the City with a childcare licensing certificate and inspection report from the Child Care Administration of the State of Maryland.

With the following conditions of approval:

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use within 2 years of approval or the approval shall become void.
- 2) The Applicant must furnish a copy of the state licensing certificate and inspection report to the City within six (6) months of the issuance of the zoning certificate or the approval shall become void.

SECOND: Mr. Hazlett

VOTE: 4-0

CASE NO.: ZBA10-368NCU

LOCATION: 614-626 North Market Street

APPLICANT: Ron Cramer, Habitat for Humanity

DESCRIPTION:

The Applicant is requesting conditional use approval to substitute the existing nonconforming use of an "Automobile Sales and Service Center (dealership)" with the new nonconforming use of a

“Building Supplies, Lumber” retailer in accordance with §905(c) of the Land Management Code (LMC)

BACKGROUND INFORMATION:

The site has most recently been used as the Renn-Kirby automobile dealership which is classified as an “*Automobile Sales and Service Center*.” Per §404, Table 404-1 of the LMC, automobile sales and service centers are not permitted in the DB district. The Applicant is seeking to relocate the Habitat for Humanity ReStore that is currently located at 1109 E Patrick Street to the subject property. In evaluating the request, the Zoning Administrator determined the use to be most appropriately classified as a “*building supplies, lumber*” retailer based on the nature of the materials for sale and the operations of the establishment (See Exhibit 2). This use is also prohibited in the DB district.

Staff noted that the Applicant has asserted that the operation is more consistent with the use of “*Hardware, Inside Storage*,” which is a permitted use in the DB district. Upon initial approach by the Applicant, Staff advised how this use would be classified and the implications of this classification. The Applicant was advised of the two alternatives- 1) substitution of a nonconforming use or 2) request a formal zoning determination which can then be appealed to the ZBA. After much discussion, the Applicant chose to file the request for the substitution.

Ms. Dunn noted that before considering the approval criteria for the substitution of a nonconforming use, it is necessary to establish two prerequisites: 1) that the existing nonconforming use is a legal nonconformity and 2) that the existing nonconforming use has operated on the site within the last 12 months. Ms. Dunn stated that the existing use was rendered nonconforming with the adoption of the 1996 Zoning Map when the property’s zoning changed from B-3, which permitted automobile sales and service, to DB, which did not permit that use, thus making it a lawfully existing nonconformity. Ms. Dunn also noted that the Applicant indicated that Renn Kirby ceased their operation on the site on August 1, 2010, however, had not provided any additional documentation to this effect. Based on the August 1, 2010 date, a nonconforming use has been operated on this site within the past year and accordingly, the Applicant is eligible to request the substitution.

Ms. Dunn summarized the criteria under Section 308 and 905 of the LMC for the substitution of a nonconforming use which include the following:

- 1) The proposed use is in harmony with the purpose and intent of the Comprehensive Plan and this Code.
- 2) The characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact than the operation of any permitted use not requiring conditional use approval.
- 3) That the proposed activity will comply with all conditions and requirements established in Article 9, Section 905 which are as follows:
 - The Applicant assumes the burden of proof and shall sufficiently present facts and the Board shall determine that it is physically or economically impossible to change the use of the lot or parcel to a conforming use. Absence of this requirement shall automatically require the ZBA to deny the conditional use.
 - The Board shall also find that the new use is of an equally or more restricted use as indicated in the district regulations in Article 4.
 - The proposed substitution nonconforming use shall meet the off-street parking, off-street loading, and other applicable requirements of this Code that would normally be required for the establishment of a use in a district that allows the proposed use.

- The Applicant shall show that the proposed changes of nonconforming uses shall be less objectionable in external effects than the existing nonconforming use with respect to: traffic generation and congestion, including truck, passenger care and pedestrian traffic; noise, smoke, dust, gases, heat, odor, glare or vibration; storage and waste disposal; and appearance
- The Applicant must provide guarantees as deemed necessary by the Board to ensure that no hazardous or obnoxious effluent will be released in the air, water or onto the ground and that all wastes and byproducts will be disposed of in a safe and healthful manner.

STAFF RECOMMENDATIONS:

Ms. Dunn noted that Staff cannot support the requested substitution of a nonconforming use in order to replace an “automobile sales and service center” with a “building supplies, lumber” retailer at 614-626 N Market Street based on insufficient documentation with regards to criteria §905(c)(4)(A)(1) which requires the applicant to assume the burden of proof in documenting that it is physically or economically impossible to change the use of the lot or parcel to a conforming use.

APPLICANT PRESENTATION:

Mr. Ron Cramer, Executive Director for Habitat for Humanity, resides at 2 Church Street introduced Mr. Brian Duncan and Mr. Steve Fox. Mr. Cramer presented a PowerPoint presentation showing who are they, indicating there are 500 plus stores across the United States, 12 ReStores in MD. He said the purpose of the ReStore is to sell new and gently used donated home improvement and household items at a deep discount for those improving Frederick housing stock. Occasionally, they receive donated items from manufacturers and/or retailers through HFHI. He mentioned that people come in looking for affordable alternatives to major retailers and that they take profits and rehab or build new affordable homes. Mr. Cramer presented the benefits of ReStore as they reuse and recycle so items do not end up in landfill or burn piles. Donors receive charitable tax credit and that they have the best volunteers. A slide showed what they accept and don't accept with hardware, lighting and electrical, plumbing, windows, doors & mantels, cabinets, furniture, shutters and tools are all acceptance to the ReStore. They do not accept clothing, electronics, hazardous materials, oil-based paints, siding, and brick or any masonry. Another slide showed the top selling categories that listed cabinets, hardware, appliances, bath fixtures, doors, lighting/electrical, windows, and furniture. Nearly 55% of their customers live in the City.

Mr. Duncan presented a slide that responded to the background information in the staff report, indicating that they sell household and home improvement items and that whether this should be classified as “hardware, inside storage” or “building supplies, lumber” could be open for discussion. Mr. Duncan stated that while in 1996 the City may have rendered some uses as nonconforming, the 2007 City Retail Market Analysis noted that its residents used such retail shops and that those stores were lacking in downtown. He went on to say that the same City funded reports states “home maintenance materials also represent a category where opportunity exists for Downtown expansion”. He felt that a retail store does meet this goal and that staff is focusing on tourism and arts but should also recognize the role of retail in meeting the goal of allowing land uses that enhance the Central Business District.

Mr. Duncan felt that this project would not create any greater adverse impact because their donated items come in pick-up trucks or their own trucks. Deliveries would be approximately 3 to 4 times a year, no outdoor storage would be on the premises. In regards to the proposed uses impacts in comparison with other uses permitted in the DB district, Mr. Duncan felt that Group Home,

Hotel/Motel, Convenience Stores, without gas sales, Department Stores, Discount Store, Furniture and/or Appliances, Grocery Stores, Office Furniture and Shopping center, all of which are allowed in the DB district but would in his opinion, create a more adverse impact than the ReStore and would require more large truck traffic. Mr. Duncan pointed out that the Webster's American English Dictionary defines "or" as "used to indicate an alternative" under the physically or economically impossible category. Mr. Duncan explained that they had Brian Nordyke, PE of Nordyke Design Group, Inc. draw up a plan for them indicating the unpredictable consequences of removing the single story framing which wraps two sides of the two-story structure. Given the age of both structures, it is likely that the two-story structure wall framing is dependent on the lateral bracing provided by the one story roof diaphragm. He also presented a slide for off street parking and loading prepared by Harris, Smariga & Associates showing the parking provided totals 70 spaces. The minimum required spaces are 41 and the maximum is 137 so they are well within the realm.

Mr. Fox provided the Board with letters of support from Jasmine Sneed, Elin Ross, Rick Adams, E. Kevin Lollar, Denise Jacoby, Jennifer Short who are all in support of this application. In conclusion from the Applicant they stated in the aforementioned Frederick City funded Retail Market Analysis, "The recruitment of additional independent retailers is recommended in Downtown Frederick to further enhance this retail mode's critical mass of unique specialty shops." He felt they will help the City meet this goal if allowed simply to operate at the now vacant Renn Kirby auto dealership facility.

DISCUSSION:

Mr. Racheff felt that the Applicant's contention is that they would be best classified as a "hardware store with inside sales" and that Staff believes the Applicant is better classified as a "building supply, lumber" retailer

Mr. Hazlett asked Staff what was different in their minds between the two classifications. Ms. Dunn explained that when Staff went on a site visit to the property, the justification was based on the site and scale of materials based on the assumption that hardware is typically a smaller scale product and more retail oriented as opposed to larger products such as some of things itemized on the website and presented in the Applicant's testimony, which is characteristic of a Home Depot or Lowes type of facility, not on the same scale obviously. There is not a definition in the Land Management Code of what is a hardware store, and there is no definition of building supply/lumber, it was an assumption or interpretation made after the site visit with evaluating the materials they provided.

Mr. Hazlett mentioned there was a use on Patrick Street that moved to Rosemont which carried a lot of stuff as this Applicant. Mrs. Dunn wanted the Board to keep in mind when looking through the Use Matrix that there are a whole variety of different uses and if Staff or the Administrator finds that there is a use that appropriately describes this use, they are obligated to select the most appropriate.

Mr. Dacey asked if a determination could be made with this application. Mrs. Depo stated that there would need to a formal determination that would be separate matter. Mrs. Dunn noted that the decision that is in front of the Board tonight is not whether the Zoning Administrator would call this a hardware store or not, the decision is whether this application meets the criteria for a substitution of a non-conforming use.

Mr. Cavazos asked the Applicant how long this property has been vacant. The owner, Mr. Sean Kirby, indicated that they had vacated in August of 2010 however it took them over a week to vacate the property.

Mr. Hazlett asked about the oil storage that is underground and how they were going to have it removed. Mr. Kirby, indicated that they had Phase II done and were not aware of any oil stored underground. Mr. Hazlett said in the repair center there is a funnel coming out of the floor where they were told waste was stored. Mr. Kirby told the Board that there is an oil separator for the water flow, but they had to do a Phase I and Phase II and he felt everything was done that they needed to have done.

Mr. Dacey wanted to know how long their lease was at this property. Applicant indicated they have a 5-year lease with Renn Kirby.

Regarding the outside storage, Ms. Colby asked the Applicant if they did have outdoor storage would Code Enforcement be involved. Mrs. Dunn said if the Board is to approve the application the Board could put a specific stipulation on the approval.

There was much discussion regarding the classification on this property and the definition of the word “impossible,” Mr. Hazlett thought that if the Board wanted to get into a debate about what is a hardware store or a lumber store. Board felt that they could not debate this because that is not the application. Applicant indicated that they would prefer hardware classification in this zone.

PUBLIC COMMENT:

Rev. Ken Dunnington resides at 620 Humberson Lane, Frederick, MD 21703 is in support of Habitat for Humanity in Frederick to be granted a nonconforming designation for the Renn Kirby property. He said that the Habitat for Humanity mission is to provide decent affordable housing in Frederick City and County. The goal that has become more and more difficult to achieve in these economic times in general, and in Frederick County, in particular, is that Habitat for Humanity Charter is to serve those in need and is rooted in the Christian Gospel. He mentioned that we cannot have affordable housing if Habitat for Humanity is not supplying hardware.

Ms. Bev Shelton resides at 9795 Chestnut Oak Court, Frederick, MD 21701, stated that she had started out as a board member for the non-profit building supply. She mentioned that they merged with Habitat for Humanity, which was the best thing they ever done. The building was cleaner, there was no lumber there and not sure where the word “lumber” came from in the first place. She asked the Board to really consider approval as this could help this part of town.

Mr. Steve Fox resides at 1566 Dockside Drive, Frederick, MD, mentioned that out all of their other locations, this is the only place that has been an issue with the store being located anywhere. He would hope that the Board approves this application.

Mr. Jean-Louis Lepage resides at 407 North Market Street.[\[g1\]](#)

Mr. Steve Duckson resides at 635 North Market stated they are 100% in support of this facility.

Ms. Valerie Waddle resides at 639 Swallowtail Drive, and is the financial manager for Habitat to Humanity and is in support for this application.

Ms. Marcia Hubbell resides at 6352 Knollwood Court stated she was a Manager for Habitat for Humanity and could possibly give the Board information that might help with the decision making easier. She didn't hear anything about having a furniture store that may be a use for this application. She explained

that most of the business was furniture and everything that is being sold is to people to improve their homes. She said most of the items that are purchased would be kitchen cabinets, paint, tile, etc. Many improvements are donated to Habitat. She cannot imagine anyone wanting to lease that building and it would be perfect for Habitat for Humanity. Mr. Racheff asked Ms. Hubbell what the main products were being sold. Ms. Hubbell responded by saying it would kitchen cabinets and following that would bathroom cabinets, furniture, doors, hardware, half sheets of plywood and that is the only lumber we receive.

Mr. Dacey asked Ms. Hubbell if it would be economically impossible to put something else in that building. Ms. Hubbell indicated that it would be impossible.

Mr. Dave Severn, Severn & O'Connor is in support of Habitat for Humanity. Mr. Severn noted that Ms. Dunn is dealing with a LMC that is not user friendly and he experienced various situations mainly in the interpretation of language in the Code. Mr. Severn asked if this was approved as a conditional use; which is the way this is set up, would that transfer with the property. Board shook their heads no. Mr. Severn went on to say so if the property is not transferrable the Applicant could not put in a Home Depot or something similar. He also said the LMC does not have a definition of supplies of lumber or a definition of hardware inside storage. He felt that the Board should look at the retail/sales which is a category permitted in a DB zone. Mrs. Dunn explained that Staff saw this building as supply/lumber category which seemed more appropriate for this application. Mr. Severn gave some legal points of the word "impossible" and an applicant has to come in here and prove to the Board that it is physically or economically impossible to change this property to a conforming use. He said he has been practicing law for 31 years and has never seen "impossible" used in any Zoning Ordinance. He felt that the Board is entitled to look at the word "impossible" and apply it in a reasonable interpretation of that word. He also felt that this property should be looked at as retail/sales. If the Board's decision to approve this application they could also put conditions on this application.

Mr. Randy Jones, Owner of Café 611, is in support of Habitat for Humanity and hopes not to see the building be empty for a long period of time. Mr. Jones commended Mrs. Dunn for her expertise and helpfulness in everything she does. He is encouraging the Board to look at approving this application.

Mr. Racheff asked Mr. Kirby if it was economically possible to use it for another use and if not; this is why the property owner is taking a lesser rent due to the economy. Mr. Kirby said yes.

Ms. Depo brought up the word "impossible" in the dictionary was referred to as "utterly" impossible.

APPLICANT REBUTTAL

Applicant indicated that Habitat ReStore is their financial well being. He felt that more homes could be built like the one they are doing on Madison Street to extend reusable products to people that have a need instead of putting it back in the landfill.

MOTION: Mr. Hazlett moved to approve ZBA10-368NCU substitution of non-conforming use for Habitat for Humanity at the Renn Kirby site in accordance with Section 308(a)(1) and 905(c) of the LMC allows the Zoning Board of Appeals to authorize a substitution of a nonconforming use with another nonconforming use as a conditional use. Section 308, "Conditional Uses" indicates that the ZBA may authorize conditional uses only when the Board finds that the following conditions are met:

- 1. The proposed use is in harmony with the purpose and intent of the Comprehensive Plan and the LMC.**

2. That the characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact that the operation of any permitted use not requiring conditional use approval.
3. That the Applicant has demonstrated that it is economy impossible to change the use of the lot or parcel to a conforming use.
4. That the new use is of an equally or more restricted use as indicated in the district regulations in Article 4 of the Land Management Code.
5. That based on testimony presented and a sight inspection, the proposed substitution of nonconforming use meets the off-street parking, off-street loading, and other applicable requirements of the LMC that would normally be required for the establishment of the use in a district that allows the proposed use.
6. That the change of nonconforming use will be less objectionable in external effects than the existing nonconforming use with respect to traffic generation and congestion; noise, smoke, dust gases, heat odor, glare, or vibration; storage and waste disposal; and appearance.
7. That the Applicant has provided assurances that no hazardous or obnoxious effluents will be released into the air, water or onto the ground and that all wastes and by products will be disposed of in a safe and healthful manner.
8. That the resulting activity will be equally or more compatible with permitted uses in the district.

With the following conditions:

1. That there will be no outside storage on the site.
2. That there will be no more than four (4) deliveries to the site by a tractor trailer per month.

Findings of Fact

- The subject property is zoned DB.
- The most recently existing use on the subject property is an “automobile sales and service” operation.
- An “automobile sales and service” operation is not permitted in the DB district.
- The previous use is considered a legal nonconforming use which has been in operation on the subject property within the past 12 months.
- The proposed use has been determined to be a “building supplies, lumber,” sales operation which is also not permitted in the DB zoning district.
- Section 905(c) grants the authority to the ZBA to authorize a conditional use approval for the substitution of one nonconforming use with another nonconforming use provided that all of the criteria outlined therein is met.

SECOND: Mr. Dacey

VOTE: 4-0

The meeting adjourned at 10:05 p.m.

Respectfully submitted,

Lea M. Ortiz